CERTIFICATE OF OPINION.

SUPREME COURT OF THE UNITED STATES.

No. ~~401~~. 121

D. T. WATSON, ASSIGNEE OF AUGUST SWEENEY, PLAINTIFF,

vs.

ISAAC TAYLOR.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED 20 JANUARY, 1873.

1 UNITED STATES OF AMERICA,
Western District of Pennsylvania:

At a circuit court of the United States, begun and held at Pittsburgh, on Tuesday, the 28th day of November, anno Domini one thousand eight hundred and seventy-one, and the ninety-sixth year of American Independence:

Present, the honorable William McKennan, and the honorable Wilson McCandless, LL. D., esquires.

D. T. WATSON, ASSIGNEE OF AUGUST SWEENEY, bankrupt,
vs.
ISAAC TAYLOR.
} No. 17. May term, 1870.

State of the pleadings.

This was an action brought in assumpsit, to recover the value of personal property of August Sweeney, a bankrupt, alleged to have been transferred or disposed of for the benefit of Isaac Taylor, the defendant, in violation of the 35th section of the bankrupt act.

Defendants pleaded non-assumpsurunt and payment. Pleas at large filed 25th April, 1870.

This action was brought and Narr. filed against E. S. Golden and I. B. Neal, attorneys at law, under the firm-name of Golden and
2 Neale, and the pleas pleaded by them, and when the cause was called for trial, it appearing to the court that said Golden & Neale had acted only as attorneys for Isaac Taylor, by consent the said Isaac Taylor was substituted as defendant, the money having been paid to him.

Whereupon this case coming on to be argued and tried at this term, and a jury being sworn, the following were proven or admitted to be the facts upon which the questions of law hereafter certified arise:

Isaac Taylor, prior to the 4th day of August, 1868, was, and still continues to be, a wholesale dry-goods merchant, residing and doing business in the city of Pittsburgh, and State of Pennsylvania.

August Sweeney, prior to 4th day of August, 1868, was, and continued to be, a retail merchant until January 13, 1869, residing and doing business in the borough of Freeport, county of Armstrong, and State of Pennsylvania. For some time prior to August 4, 1868, and up until January 1, 1869, August Sweeney was a customer of the said Isaac Taylor in the purchasing of merchandize on credit according to the usual course and custom of the business.

3 On the 4th day of August, 1868, August Sweeney was justly indebted to Isaac Taylor in an account then due, for merchandize previously purchased in the ordinary course of business, and on that day, according to the custom of said Isaac Taylor, and in the ordinary course of business, closed the account by executing and delivering to said Taylor a note, with warrant of attorney, for $800, the balance of the account, embracing the amount of a small bill of goods, about $13, that day sold said Sweeney, payable 4 months after date, with interest. After this, Sweeney continued to purchase from Isaac Taylor merchandize as before, all of which has been paid for, but paid nothing on the note.

It also appears from the evidence that it was the regular custom of said Taylor to close such accounts by taking notes with warrant of attorney.

The note aforesaid remained unpaid, and on the 1st day of January, 1869, was by one McKnight, agent of said Taylor, delivered to Golden & Neale, his attorneys, at Armstrong County, Pennsylvania, for collection, he having demanded payment a day or two before, and was by them entered of record and judgment confessed by virtue of the war-
4 rant of attorney, and on the same day a writ of fieri facias issued thereon and delivered to the sheriff, which became a lien, under the State laws, upon the goods and chattels of said August Sweeney, and upon the 4th day of January, 1869, an actual levy was made in pursuance of said writ upon the personal estate of said Sweeney, consisting of dry-goods, groceries, &c., in his store at Freeport, being all he had, the store being closed & sold out on the execution, (he having no real estate,) and, in accordance with said law, said goods and chattels were sold by the sheriff on the 13th day of January, 1869, and on the 18th of January, 1869, the sum of $860.52 paid over by the sheriff to Golden & Neale, as attorneys, and by them paid over to Isaac Taylor. Neither Isaac Taylor or his counsel became the purchasers of any property thus sold by the sheriff.

It appears from the evidence given in the case that at the time of taking the note and confessing judgment thereon, there was no fraud or collusion intended by either Taylor or Sweeney, and said Taylor testified that he did not know or have any reasonable cause to believe that Sweeney was bankrupt or insolvent, or contemplated bankruptcy or insolvency, or any fraud on the bankrupt law.

5 On the 15th day of January, 1869, two days after the sale, a petition in bankruptcy was filed in the United States district court, at Pittsburgh, against August Sweeney, by James O'Hanlon and others, creditors of August Sweeney, and on the same day an injunction was awarded, which was never served personally on Isaac Taylor, or in any manner upon his attorneys, but was served on the sheriff of Armstrong County on the 18th January, 1869, after the money had been paid over. There was no evidence given to show that, at the time of receiving the money, either Taylor, his attorney, or the sheriff, had any notice of said writ of injunction or proceedings in bankruptcy.

On the 2d day of February, 1869, August Sweeney was adjudged bankrupt, in default of appearance to the rule to show cause, and on the 30th day of March, 1869, D. T. Watson was chosen his assignee, to whom an assignment was duly made by the register.

Whereupon, on the trial and argument of the cause at this term, it occurred as a question:

Question 1. Whether the confession of judgment, execution, levy and sale, as proved, constituted an indirect transfer of the property with a view to give a preference, within the meaning of the 35th section of the bankrupt act.

6 And upon the same trial and argument another question occurred, to wit:

Question 2. Whether the confession of judgment, execution, levy, and sale aforesaid, constituted a transfer or other disposition of the property, with a view to give a preference.

And upon the same trial and argument another question occurred, to wit:

Question 3. Whether, if the facts aforesaid constituted a transfer or other disposition within the meaning of the bankrupt act, it was made at the date of the warrant of attorney, or at or after the time of confessing the judgment.

And upon the same trial and argument another question occurred, to wit:

Question 4. Whether, from the debtor's default in payment of the debt, the warrant of attorney, the confession of judgment, execution and levy as aforesaid, the execution creditor had reasonable cause to believe that the debtor was insolvent, and that the proceedings were in fraud of the bankrupt act.

And upon the same trial and argument another question occurred, to wit:

Question 5. Whether the entry of judgment in the State court and the proceedings therein as aforesaid, constitute a bar to the present suit.

7 And on the trial and argument aforesaid, on each and every of said questions, to wit, numbers one, two, three, four, and five, the opinions of said judges were opposed.

Whereupon, on motion of said defendant, Isaac Taylor, by his counsel, Messrs. James K. Kerr, Geo. W. Guthrie, and E. S. Golden, that the points upon which the disagreement hath happened, may be, during the term, stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided:

It is ordered that the foregoing state of the pleadings, and the statement of facts which is made under the direction of the judges, be certified according to the request of the defendant, by his counsel, and the law in that case made and provided.

8 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Certified to the Supreme Court of the United States pursuant to the statute.

In testimony whereof witness my hand and the seal of said court, at Pittsburgh, this 27th December, 1871.

[SEAL.] H. D. GAMBLE, *Clerk.*

I do also further certify that the division of opinion in this case was not finally agreed upon until December 26th, 1871.

H. D. GAMBLE, *Clerk.*

(Indorsement on cover:) No. 401. D. T. Watson, assignee of August Sweeney, plaintiff, vs. Isaac Taylor. W. Pennsylvania, C. C. U. S. Filed 20th January, 1873.

United States Supreme Court.

NO. ~~[illegible]~~ 121

WATSON, ASSIGNEE OF SWEENEY;

VERSUS

ISAAC TAYLOR.

ON CERTIFICATE OF DIVISION BETWEEN THE JUDGES OF THE U. S. CIRCUIT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

POINTS AND BRIEF OF ARGUMENT ON PART OF ISAAC TAYLOR.

E. S. GOLDEN, J. K. KERR, & G. W. GUTHRIE, Attornies.

Democratic Sentinel Print, Kittanning, Pa.

IN THE

Supreme Court of the United States.

No. 121. October Term, 1874.

D. T. WATSON, Assignee of AUGUST SWEENEY, Plff.;

VERSUS

ISAAC TAYLOR, Defendant.

Statement of the Case.

Isaac Taylor is, and was at the time of the occurrences upon which this suit is based, a dry goods merchant, carrying on business in the city of Pittsburgh, and selling goods to the various retail dealers throughout the western district of Pennsylvania.

On the 4th day of August, 1868, August Sweeney, the bankrupt, was indebted to Taylor for goods sold and delivered to him previous to that date. On that day Mr. Taylor's agent called on him, and after selling him a small bill of goods, took his note for the amount due, including the goods then sold, payable four months after date, with warrant of attorney to confess judgment.

There was no evidence to show, that at the time of giving the note, Sweeney was insolvent, or contemplated insolvency; and the statement of facts contained in the certificate, expressly negatives all fraud or collu-

sion between the parties, either at that time or at the time the judgment was entered.

Taylor's perfect good faith is shown by the fact that he continued to sell goods on credit to Sweeney after taking the note, and that the goods so sold were all duly paid for.

When the note came due, and was not paid, Mr. Taylor sent it to his attorneys for collection, and they proceeded to collect it, by confessing judgment under the warrant, on January 1, 1869, (nearly one month after it was due,) and issuing execution.

It is not claimed that Mr. Taylor had any cause to believe Sweeney insolvent at this time, unless the mere failure to pay the note when due was in itself sufficient to put him with notice, and it is admitted that there was no fraud or collusion intended by either of them.

Points.

This certificate presents practically but two questions for the decision of the Court:

1st. Whether the lien obtained by entering judgment and issuing and levying execution in Armstrong county is a void preference under the provisions of the 35th and 39th sections of the Bankrupt Act.

2d. Whether the distribution of the proceeds of the Sheriff's sale, made under and in accordance with the laws of Pennsylvania by a Court of general jurisdiction, is conclusive in this action.

FIRST.

Since the decision of this Court in the case of Wilson

vs. City Bank, 17 Wall. 473, it must be conceded that a creditor having a valid judgment, may issue execution and levy the same on the goods of the debtor, and that the lien thus obtained will be sustained, even though he knew, at the time of issuing it, that his debtor was insolvent; or, having a claim which has not yet passed into judgment, he may institute an adversary proceeding, obtain judgment by default, and issue execution against his debtor, "up to the very moment of bankruptcy," unless complicity between them can be shown.

Although very much mooted at one time, in the District and Circuit Courts, it must now be considered settled, that the bankrupt law does not require a debtor as soon as he is unable to pay his debts in the ordinary course of business, to file his petition for adjudication in bankruptcy; neither does it require a creditor to petition against his debtor in bankruptcy, and refrain from all endeavors to collect his debt by proceedings in the State Courts. On the contrary, a creditor's activity in collecting his debt by judgment and execution, and the mere passive non-resistance thereto by the debtor, are not in violation of the Act.

In Wilson vs. City Bank, as in this case, the judgment itself gave no lien, and the only assets of the debtor consisted of the stock of goods in trade, all of which were taken on the execution; the only difference between the cases is, that in the former, judgment was obtained by default in the adversary proceeding, while in this, it was confessed by virtue of a warrant of attorney given more than four months before, at a time when it is not contended that the debtor was insolvent,

or that the creditor had any reasonable cause to believe him so, unless the mere failure to pay this debt when due constituted such insolvency and notice.

Unless, therefore, the giving of the warrant of attorney, or the entry of the judgment thereon, was a violation of the Act, the answer to the first, second and fourth questions must be in the negative.

It is not contended that Sweeney was insolvent at the time the warrant of attorney to confess judgment was given, or that there was any complicity between him and Taylor. The note, with the warrant attached, was given to close an account; and on the same day Taylor sold Sweeney a small bill of goods, and continued selling goods to him until a short time before entering judgment.

Under these circumstances, Sweeney had a perfect right to give, and Taylor to accept, the warrant to confess judgment. If the judgment had been entered on the day the warrant was given, there could not now be any question as to the legality of these proceedings.

The favorite argument against proceedings such as this is, that the preference is given at the time the judgment is entered, and not when the warrant is executed and delivered. If the judgment had been entered by Taylor on the day the warrant was executed, it would not have given him any lien whatever, and would not have been of any greater use to him than the warrant itself. In Pennsylvania, a judgment is not a lien on personal property; a lien is not acquired until the writ is placed in the hands of the Sheriff.

If any preference was given, it was at the time the warrant was executed and delivered; it was then that Sweeney deprived himself of the power to prevent judgment being entered and execution issued at the pleasure of the creditor. But at that time he was not insolvent, and had a right to give this advantage to any one of his ~~debtors~~ that he saw fit to prefer.

Why should we require the creditor to enter judgment on his warrant, when he would gain nothing by doing so? The judgment alone would have given him no lien, and it was only by the execution that a lien was obtained. It seems inconsistent to admit, that if the judgment had been entered the day the note was given, the proceedings would have been valid, and yet to maintain that the present proceedings are invalid and illegal because the judgment was actually entered when the debtor was insolvent, although without connivance on his part; and without the creditor having any knowledge of such insolvency, unless the Court rules, as a matter of law, that the mere failure to pay a debt at maturity is sufficient notice thereof. Any one familiar with the course of business in the country districts, at the present time, knows that, as a matter of fact, such failure to pay is not regarded as evidence of insolvency.

The case of Wilson vs. City Bank, clearly establishes the rule, that if we had brought suit on this note, and recovered judgment by default, we would have had the right to hold on to the advantages acquired by our vigilance and activity. If this be true, then why should we be forbidden to avail ourselves of a power

given to us when we had a right to receive it, and the debtor to give it?

The certificate of division expressly states, "that at the time of taking the note and confessing judgment thereon, there was no fraud or collusion intended by either Taylor or Sweeney;" the only point, therefore, on which this case differs from Wilson vs. City Bank is, that in the latter case judgment was recovered by default, while in this it was entered on a warrant given over four months before, at a time when the debtor was not actually insolvent, and when the creditor believed him to be solvent, which is shown by his continuing to sell goods to him for some time thereafter.

The 39th section of the Bankrupt Act expressly points out under what circumstances the giving of a warrant to confess judgment is an illegal preference, viz: when the debtor is insolvent, the creditor has reasonable cause to believe him so, and the warrant is given with intent to prefer. If any of these circumstances are wanting, the warrant is lawful, and rights acquired under it must be protected.

EDWARD S. GOLDEN,
JAMES K. KERR,
GEO. W. GUTHRIE.
Attornies for Isaac Taylor.

See opinion of Strong J. in the case of Edwin S. Paper assignee of Levi Bergen vs. Edward M. Buckley. Reported in Phila. Leg. Int. Oct 3. 1874 page 316.